INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:	
Cunningham v. *Underwood*, 116 Fed. 803	7
Freeman v. *United States*, 158 F. 2d 891, certiorari denied, 331 U. S. 805	9
Gaines v. *Relf*, 53 U. S. 472	7
Kulp v. *United States*, 210 Fed. 249	9
Michelson v. *United States*, 335 U. S. 469	7
Singer v. *United States*, 278 Fed. 415, certiorari denied, 258 U. S. 620	9
United States v. *Farina*, 184 F. 2d 18, certiorari denied, 340 U. S. 875	9
United States v. *Means*, 42 Fed. 599	9
United States v. *Pagano*, 224 F. 2d 682, certiorari denied, 350 U. S. 884	7
United States v. *Rossi*, 219 F. 2d 612, certiorari denied, 349 U. S. 938	7
Walder v. *United States*, 335 U. S. 469	7
Rule:	
30 F. R. Crim. P., Rule 30	9
Miscellaneous:	
Wigmore, *Evidence* (3rd ed.) Volume 5, Section 1612	7

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 288

ALF MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19; R. 125–126) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1956 (Pet. 19; R. 125–126). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Burton to August 3, 1956 and the petition for a writ of certiorari was filed on July 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court committed reversible error in allowing the govern-

ment, in the presentation of its case, to question certain of its witnesses concerning the reputation of petitioner and of his place of business.

2. Whether the government witnesses in question were qualified to testify to petitioner's reputation.

3. Whether the court's charge properly explained "reasonable doubt."

STATEMENT

Following a trial by jury, petitioner was convicted under a seven-count indictment which charged him and a co-defendant with the illegal manufacture of spiritous liquors in October, 1954, in violation of federal revenue laws (R. 4–6, 7). He was sentenced to concurrent terms of imprisonment of two years on counts 1, 2, 3, 5, 6 and 7 and six months on count 4, and was fined $100 on counts 1, 2 and 3, $500 on count 5, and $200 on count 7 (R. 8). On appeal, the judgment of conviction was affirmed (Pet. 19; R. 125–126).

The evidence adduced at the trial may be summarized as follows:

Petitioner, who operated a restaurant in Cocke County, Tennessee, owned a farm in that county where he had some cattle (R. 76, 78–79).[1] The farm contained a dwelling and outbuildings (R. 24). Beginning February or March, 1954, the dwelling was occupied by co-defendant Evans and his family (R. 24, 80).

On October 18, 1954, pursuant to a search warrant, federal investigators of the Alcohol Tax Unit searched the house and other buildings on the farm. On the

[1] Although Cocke County was dry, petitioner sold federally-authorized whiskey at the restaurant. He had never been arrested for the local violations (R. 77, 84–85).

land across from the house, they found over 2,000 half-gallon fruit jars containing whiskey. The containers did not bear federal revenue stamps. In another building, they found two 1,000-gallon still pots which were unregistered and unbonded, a 2,000-gallon tank, and approximately 2,000 gallons of meal mash suitable for distillation (R. 22–25). No sign was posted to indicate that the distillery was registered (R. 25). The investigators found a hose buried underground and running for 100 to 150 feet into an open pasture where mash residue was found (R. 26). The distilleries, which appeared to have been in operation approximately three months (R. 58), were fired with fuel oil burners; the still house was electrically lit; water was supplied by an underground hose running to the still house from a hydrant on the farm; and an electric pump was used to pump the pressure tank. One of the investigating officers described the set-up as elaborate and as costing $700 or $800 "or more" (R. 32–33, 54).

In an interview following the search, petitioner said that co-defendant Evans (who had told the officer he was a tenant in "rather poor circumstances" (R. 52)) occupied the dwelling and looked after the farm; that, while he (petitioner) paid for the utilities for the outbuildings, the meter on the dwelling was in Evans' name and Evans paid the electricity thereon (R. 31–32, 39). He said that he visited his farm on the average of once a week and on such visits had not noticed anything out of the way (R. 32).

The records of the electric company from January to December, 1954, showed a substantial increase in

the readings from the meter in petitioner's name beginning with July, 1954 (R. 61–63).

Petitioner took the stand and denied that he ever "handled" moonshine whiskey (R. 77). He said that he rented his farm dwelling to co-defendant Evans in return for Evans' taking care of the cattle, and that he did not go to the farm "very much." He stated that he had not visited the farm more than six times between June and October 18; that he did not know that a distillery operation was being conducted on his land; that he had no financial interest in the operation; and that, when he visited the farm, he never detected the odor of whiskey or spent mash (R. 80–83, 86). Several defense witnesses testified that petitioner's reputation was good and that they had not heard that he engaged in moonshine whiskey operations (R. 88–90, 91–92, 93–94, 94–95).[2]

ARGUMENT

1. During the cross-examination of a federal government officer who had participated in the search of the farm (R. 22), the following occurred (R. 42):

> Q. [Mr. DOUGHTY] Alf Miller told you, and you know it to be true, that his business is running the White House Grill over on the road that leads from Newport down to Knoxville?
>
> A. I know he does run the White House Grill, yes, sir.
>
> Q. He spends about 14 hours a day working at the grill?

[2] Other defense testimony indicated that the pump on the farm was used to water the cattle and that the summer of 1954 had been unusually dry (R. 103–106).

A. I don't know.

Q. You know that is one of the better eating places around Newport, has an A–1 rating?

A. No, sir, I don't know that.

Q. It is a nice, clean appearing place?

A. Yes, it is.

On redirect examination by government counsel (R. 56–57, 59):

Q. [Mr. MEEK] Mr. Griffin, something was undertaken to be brought out on cross-examination of you by Mr. Doughty about the reputation of the White House Grill, owned and operated by Mr. Alf Miller. What is the general reputation of that White House Grill as being a bootleg joint or otherwise?

* * * * *

Q. What is the reputation of the White House Grill, operated by Alf Miller, as being a bootleg place?

By the witness:

A. It is a bootleg place.

* * * * *

By Mr. Meek:

Q. Mr. Griffin, do you know the reputation of Alf Miller concerning moonshine whiskey?

A. I do.

Q. What is it?

A. It is—his reputation as given to me by reports is that he is a dealer in moonshine whiskey.

* * * * *

On recross-examination by defense counsel (R. 59–60):

Q. Are you willing to give the name, Mr. Griffin, of anybody anywhere who told you that?

> Mr. Meek: Just a minute, if your Honor please. I don't think that this officer can be or should be forced to divulge the names of informers, because it sometimes leads to bloodshed.
>
> The Court: He has not asked him to do that.
>
> * * * * *
>
> Mr. Doughty: I will state for the benefit of the District Attorney that we intend to put Mr. Miller's character in evidence.

Thereafter, while still presenting its case, the government introduced additional witnesses who testified that petitioner had a reputation of dealing in moonshine whiskey (R. 66–67, 72). In defense, petitioner testified and introduced several character witnesses. (See the Statement, *supra*, p. 4).

The unequivocal statement of petitioner's attorney that the defense intended to put petitioner's character in issue establishes the lack of merit in petitioner's present contention (Pet. 7–15) that it was reversible error to permit the government to introduce evidence concerning his reputation as part of the government's case. The general rule to which petitioner refers (Pet. 11–13), *i. e.*, that the character of a defendant cannot be initially attacked by the prosecution, is based on the proposition that character is not in issue until a defendant makes it an issue by introducing proof of his good character. In this case, however, petitioner's counsel not only first injected the issue into the case by his cross-examination of the revenue agent, but further made clear to all parties that character would be an issue. Once that issue was in the case, the govern-

ment clearly had the right to introduce evidence of bad reputation.[3] There was no prejudice in permitting the introduction, as part of the case in chief, of evidence which, in view of counsel's statement, was then known to be admissible in rebuttal.

2. The government witnesses who testified to petitioner's bad reputation were Alcohol Tax Unit investigator Griffin (R. 56–57), another Alcohol Tax Unit investigator, Mr. Bomar (R. 66), and the Chief United States Deputy Marshal, Roy Whaley, a former sheriff (R. 72). As law enforcement officers, they were clearly qualified to pass on petitioner's general reputation in the community for dealing in whiskey. See *Michelson* v. *United States*, 335 U. S. 469, 477; *Gaines* v. *Relf*, 53 U. S. 472, 553; Wigmore, *Evidence* (3rd ed.) Volume 5, section 1612. Mr. Whaley's testimony that his statement as to petitioner's reputation was based on information given by two or three persons (R. 72) does not render his testimony incompetent. For the information which he received from these persons came to him in his official capacity as a law enforcement officer, and was, in turn, based on general knowledge in the community. See *Cunningham* v. *Underwood*, 116 Fed. 803, 811 (C. A. 6), stating that it "is not necessary that a character witness shall be able

[3] As this Court observed in *Michelson* v. *United States*, 335 U. S. 469, 479, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him". See also *Walder* v. *United States*, 347 U. S. 62; *United States* v. *Rossi*, 219 F. 2d 612 (C. A. 2), certiorari denied, 349 U. S. 938; *United States* v. *Pagano*, 224 F. 2d 682 (C. A. 2), certiorari denied, 350 U. S. 884.

to say that he knows what a majority, or any other particular number, of the persons conversant with the person inquired about say about him. If the witness has heard enough to enable him to say that he thinks he knows the prevailing opinion entertained of him by his acquaintances, he is competent to speak * * *."

3. The court, in its charge, discussed the burden of proof, the presumption of innocence, and the need to overcome the presumption beyond a reasonable doubt. (R. 110–111). In defining reasonable doubt, the court stated (R. 111–112):

> The government does not have to prove a criminal case to that absolute certainty; it has to prove it, though, so as to leave no reasonable substantial doubt in the minds of the jury. A substantial doubt does not mean an uneasy feeling not based upon the evidence, a feeling that perhaps, although the defendants appear to be guilty, although a case seems to be made out, there may be a mistake about it. Just an objection to finding a man guilty, or a feeling that perhaps there may be some mistake, an uneasy, restless feeling of that sort, is not sufficient to constitute a reasonable doubt. A doubt that prevents you from finding a man guilty if the proof shows guilt is not to be a whimsical or capricious doubt, but a substantial doubt, and it must rest upon some element of weakness in the proof as a whole, so as to cause you, as reasonable lady and gentlemen, a reason for doubting guilt.

> If there should be any evidence in the case that has created a reasonable doubt in your minds of the guilt of either of the defendants, then that defendant, or those defendants, where doubt exists, should be acquitted, but if there is no reasonable ground of doubting guilt, as reasonable lady and gentlemen, then it is made out beyond a reasonable doubt.

Although he did not question the charge at the trial (see R. 121a), petitioner now contends (Pet. 16–17) that the instruction constituted reversible error because of the inclusion of the statement that a "feeling that perhaps there may be some mistake" is not sufficient to constitute "substantial doubt." His afterthought on the subject presents no basis for reversal. Rule 30, F. R. Crim. P. The charge as a whole, which included the statement that a reasonable doubt is one that is based on the evidence and not on whim or caprice, told the jury in substance that an uneasy feeling that there was a mistake may be a whimsical or capricious doubt and not sufficient to justify acquittal. Such a statement of the law has been consistently upheld as correct. *Freeman* v. *United States*, 158 F. 2d 891 (C. A. 9), certiorari denied, 331 U. S. 805; *United States* v. *Farina*, 184 F. 2d 18 (C. A. 2), certiorari denied, 340 U. S. 875; *Singer* v. *United States*, 278 Fed. 415 (C. A. 3), certiorari denied, 258 U. S. 620; *United States* v. *Means*, 42 Fed. 599 (C. C. Ohio); *Kulp* v. *United States*, 210 Fed. 249 (C. A. 3).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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